Cir. 2001)(Table), and this Court denied her petition for a *writ of certiorari*. *Fair v. United States*, 534 U.S. 892 (2001).

Thereafter, Tammy Fair filed her 28 U.S.C. § 2255 motion with the district court claiming, *inter alia*, that she did not knowingly and voluntarily waive her fundamental constitutional right to testify. After an evidentiary hearing, the magistrate judge found that Tammy's trial counsel "did not advise her of her right to testify," 41a, but recommended that her § 2255 motion be denied, because she failed to prove prejudice under the second prong of *Strickland v. Washington*, 466 U.S. 668 (1984). 47a. The district court adopted the magistrate judge's reports and recommendations in part and entered judgment against Tammy Fair without considering her argument that harmless error analysis did not apply to a deprivation of her constitutionally protected right to testify. 6a-16a. The circuit court affirmed on October 3, 2005, likewise not considering her argument that the denial of her right to testify was a structural defect not subject to harmless error analysis. 1a-5a.

REASONS FOR ALLOWANCE OF THE WRIT

THIS PETITION FOR A *WRIT OF CERTIORARI* SHOULD BE GRANTED BECAUSE THE ELEVENTH CIRCUIT COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT; HAS DECIDED THAT IMPORTANT FEDERAL QUESTION IN A MANNER INCONSISTENT WITH RELEVANT DECISIONS OF THIS COURT; AND HAS DECIDED THAT IMPORTANT FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH DECISIONS OF FEDERAL CIRCUIT AND DISTRICT COURTS.

"[I]t cannot be doubted that a defendant in a criminal case has the right to take the witness stand and to testify in his or her own defense." *Rock v. Arkansas*, 483 U.S. at 49. "Whether the defendant is to testify is an important tactical decision as well as a matter of constitutional right." *Brooks v. Tennessee*, 406 U.S. at 612. This right to testify is found in several provisions of the Constitution: the due process clause, the compulsory process clause, the Sixth Amendment's right of self-representation, and the necessary corollary of the guarantee against compelled testimony. *Rock*, 483 U.S. at 51-53. "Even more fundamental to a personal defense than the right of self-representation. . .is an accused's right to present his own version of events in his own words." *Id.* at 52.

A. THIS COURT SHOULD SETTLE, AS A MATTER OF FEDERAL LAW, WHETHER AN UNKNOWING AND INVOLUNTARY WAIVER OF THE RIGHT TO TESTIFY IS PREJUDICIAL *PER SE* AND NOT SUBJECT TO HARMLESS ERROR ANALYSIS.

Federal and state courts uniformly hold that the federal constitutional right of criminal defendants to testify is fundamental and personal to the defendant, and cannot be waived by defense counsel, even though this Court has yet to explicitly so hold. *E.g.*, *United States v. Ortiz*, 82 F.3d 1066, 1070 (D.C. Cir. 1996); *Brown v. Artuz*, 124 F.3d 73, 77-78 (2nd Cir. 1997), *cert. denied*, 522 U.S. 1128 (1998); *United States v. Pennycooke*, 65 F.3d 9, 10 (3rd Cir. 1995); *United States v. McMeans*, 927 F.2d 162, 163 (4th Cir. 1991); *Jordan v. Hargett*, 34 F.3d 310, 312 (5th Cir. 1994), *vacated without consideration of this point*, 53 F.3d 94 (5th Cir. 1995)(*en banc*); *Rogers-Bey v. Lane*, 896 F.2d 279, 283 (7th Cir. 1990), *cert. denied*, *Rogers-Bey v. McGinnis*, 498 U.S. 831 (1990); *United States v. Bernloehr*, 833 F.2d 749, 751 (8th Cir. 1987);

United States v. Edwards, 897 F.2d 445, 446-447 (9th Cir.), *cert. denied*, 498 U.S. 1000 (1990); *United States v. Teague*, 953 F.2d 1525, 1532 (11th Cir.)(*en banc*), *cert. denied*, 506 U.S. 842 (1992); *Momon v. State*, 18 S.W.3d 152, 161 (Tenn. 2000); *State v. Antoine*, 564 N.W.2d 637, 639 (N.D. 1997); *LaVigne v. State*, 812 P.2d 217, 222 (Alaska 1991); *People v. Curtis*, 681 P.2d 504, 512 (Colo. 1984); *State v. Neuman*, 371 S.E.2d 77 (W.Va. 1988); *State v. Rosillo*, 281 N.W.2d 877, 878 (Minn. 1979); *see also*, *Lema v. United States*, 987 F.2d 48, 52 (1st Cir. 1993)(assuming without deciding that the right to testify may not be waived by counsel). A criminal defendant cannot make a knowing and voluntary waiver of her right to testify where trial counsel does not advise her of her right to testify or that only she can waive that right, does not discuss with her the tactical reasons for exercising or waiving that right, and does not call her as a witness at trial. Any waiver of the right to testify under these circumstances cannot be considered a valid waiver of that right.

This Court has never considered the question of whether an unknowing and involuntary waiver of one's fundamental constitutionally protected right to testify is prejudicial *per se* and, therefore, not subject to harmless error analysis. The Eleventh Circuit Court of Appeals applied harmless error analysis to Tammy Fair's unknowing and involuntary waiver of her right to testify and affirmed the district court's denial of her 28 U.S.C. § 2255 motion. The circuit court found that the district court did not commit clear error in its findings of fact nor did it commit legal error in its analysis "relating to the Strickland prejudice prong." App. 5a. The circuit court did not address the *Strickland* performance prong, nor did it consider Tammy's argument that her unknowing and involuntary waiver of her fundamental constitutional right to testify constituted a structural defect not subject to harmless error analysis. By considering only the *Strickland* prejudice

prong, the circuit court essentially held that trial counsel could waive a defendant's right to testify if in the court's judgment it constituted harmless error, *i.e.*, the waiver did not cause prejudice to the defendant.

B. THE CIRCUIT COURT DECIDED THIS FEDERAL QUESTION IN A MANNER INCONSISTENT WITH RELEVANT DECISIONS OF THIS COURT.

The circuit court applied harmless error analysis in Tammy Fair's case, and did not consider whether her failure to take the witness stand was an unknowing and involuntary waiver of her right to testify, or, if her unknowing and involuntary waiver was a structural defect not subject to harmless error analysis. This decision by the circuit court is inconsistent with relevant decisions of this Court which addressed the question of valid waivers of federal constitutional rights, and which held that constitutional errors constituting structural defects cannot be considered harmless error. Consistent application of this Court's relevant decisions show that an unknowing and involuntary waiver of the right to testify constitutes a structural defect not subject to harmless error analysis.

1. Waivers of Constitutional Rights

This Court has asserted at least five principles to be used in assessing waivers of federal constitutional rights: 1) a valid waiver requires "an intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464, (1938); *see also*, *Brookhart v. Janis*, 384 U.S. 1, 4 (1966); *Brewer v. Williams*, 430 U.S. 387, 404 (1977); 2) the exercise of federal constitutional rights does not depend upon a request from the defendant, *Carnley v. Cochran*, 369 U.S. 506, 513 (1962); *Brewer*, 430 U.S. at 404; 3) courts should "indulge every reasonable presumption

against waiver of fundamental constitutional rights." *Johnson*, 304 U.S. at 464; *Boykin v. Alabama*, 395 U.S. 238, 242-243 (1969); 4) where the issue arises the government has the burden of establishing a valid waiver, *Brewer*, 430 U.S. at 404; and 5) "[d]oubts must be resolved in favor of protecting the constitutional claim." *Michigan v. Jackson*, 475 U.S. 625, 633 (1986). Neither the circuit court nor the district court in Tammy Fair's case considered any of these precedents in reaching their respective decisions.

2. Structural Defects Not Subject to Harmless Error Analysis

This Court has also held that at least six constitutional errors are structural defects not subject to harmless error analysis: 1) a judge who is not impartial, *Tumey v. Ohio*, 273 U.S. 510 (1927); 2) the total deprivation of the right to counsel at trial, *Gideon v. Wainwright*, 372 U.S. 335 (1963); 3) the unlawful exclusion of members of the defendant's race from a grand jury, *Vasquez v. Hillery*, 474 U.S. 254 (1986); 4) the *Faretta* right to self-representation at trial, *McKaskle v. Wiggins*, 465 U.S. 168, 177-178 n.8 (1984); 5) the right to a public trial, *Waller v. Georgia*, 467 U.S. 39, 49 n.9 (1984); and 6) a defective reasonable doubt standard, *Sullivan v. Louisiana*, 508 U.S. 275 (1993). "Each of these constitutional deprivations is a similar structural defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself." *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991). "Put another way, these errors deprive defendants of 'basic protections' without which 'a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence and no criminal punishment may be regarded as fundamentally fair." *Neder v. United States*, 527 U.S. 1, 8-9 (1999)(internal quotation marks and ellipsis omitted). Neither the circuit court nor the district court addressed Tammy Fair's argument that her

unknowing and involuntary waiver of her right to testify constituted a structural defect not subject to harmless error analysis.

3. An Unknowing and Involuntary Waiver of the Right to Testify Constitutes a Structural Defect Not Subject to Harmless Error Analysis.

An unknowing and involuntary waiver of the fundamental constitutionally protected right to testify deprives a defendant of a basic protection without which a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment after such a criminal trial may be regarded as fundamentally fair. *Neder v. United States, Id.* A deprivation of the right to testify is on par with other structural defects not subject to harmless error analysis.

One source for an accused's right to testify is a defendant's Sixth Amendment right to conduct her own defense, recognized by this Court in *Faretta v. California*, 422 U.S. 806 (1975). *Rock v. Arkansas*, 483 U.S. at 51-53. The denial of this Faretta right of self-representation "is not amenable to 'harmless error' analysis. The right is either respected or denied; its deprivation cannot be harmless." *McKaskle v. Wiggins*, 465 U.S. at 177-178 n.8. "Even **more fundamental** to a personal defense than the right of self-representation. . .is an accused's right to present his own version of events in his own words." *Rock v. Arkansas*, 483 U.S. at 52 (emphasis added). Logically, if denial of the *Faretta* right of self-representation is not amenable to "harmless error" analysis, and the right to testify is a) in part derived therefrom and b) "more fundamental" that the *Faretta* right of self-representation, denial of one's right to testify is not amenable to "harmless error" analysis.

This logical conclusion is further supported by this Court's assertion in *Luce v. United States*, 469 U.S. 38 (1984), that an "appellate court could not logically term 'harmless' an error that presumptively kept the defendant from testifying." *Luce v. United States*, 469 U.S. at 42.

C. THE CIRCUIT COURT DECIDED THIS FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH DECISIONS OF OTHER FEDERAL CIRCUIT AND DISTRICT COURTS.

The United States Court of Appeals for the Ninth Circuit, citing this Court's opinion in *Luce*, concluded that "[a]s a general matter, it is only the **most extraordinary** of trials in which a denial of the defendant's right to testify can be said to be harmless beyond a reasonable doubt." *Martinez v. Ylst*, 951 F.2d 1153, 1157 (9th Cir. 1991) (emphasis added). Tammy Fair's trial was no more extraordinary than any trial in which a defendant, not knowing of her right to testify or that it was solely her decision whether to testify, was not called to the witness stand by her counsel, and thereby deprived of her right to testify.

At least two federal district courts have unequivocally concluded that an unknowing and involuntary waiver of one's fundamental constitutionally protected right to testify is prejudicial *per se* and, therefore, not subject to harmless error analysis. The United States District Court for the District of Maine considered "a defendant's right to testify in a criminal proceeding against him so basic to a fair trial that its infraction can **never** be treated as harmless error, which is in essence the inquiry required to be made by the second, prejudice to the defense, prong of *Strickland*." *United States v. Butts*, 630 F.Supp. 1145, 1148-1149 (D.Me. 1986)(emphasis added). The United States District Court for the District of Massachusetts asserted that "[f]ailure to inform

a defendant of the right to testify constitutes structural error that is per se prejudicial." *Owens v. United States*, 236 F.Supp.2d 122, 143 (D.Mass. 2002). The Massachusetts District Court, "[could] not imagine a context wherein providing the jury with the opportunity to hear a defendant's side of the story, observe his demeanor, and make character assessments would not be critical." *Owens v. United States*, 236 F.Supp.2d at 143.

Justice Kennedy recognized these same considerations in his opinion concurring in the judgment in *Riggins v. Nevada*, 504 U.S. 127 (1992). "It is a fundamental assumption of the adversary system that the trier of fact observes the accused throughout the trial, while the accused is either on the stand or sitting at the defense table. This assumption derives from the right to be present at trial, which in turn derives from the right to testify and rights under the Confrontation Clause." *Riggins*, 504 U.S. at 142 (Kennedy, J., concurring in the judgment). "[T]he defendant's behavior, manner, facial expressions, and emotional responses, or their absence, combine to make an overall impression on the trier of fact, **an impression that can have a powerful influence on the outcome of the trial**. If the defendant takes the stand. . .his demeanor can have a great bearing on his credibility, persuasiveness, **and on the degree to which he evokes sympathy**." *Riggins v. Nevada*, *Id.* (emphasis added).

Observing a defendant on the witness stand provides the fact finder a far greater opportunity to evaluate that defendant than merely observing that defendant sitting passively at the defense table. Hearing a defendant's side of the story from her own lips alone might induce the jury to view her more favorably and find her not guilty. As Judge Godbold argued many years ago, "it is impossible, and perhaps improper, to attempt to judge the effect that the defendant's appearance on

the stand would have had on the jury." *Wright v. Estelle*, 572 F.2d 1071, 1081 (5th Cir. 1978)(Godbold, J., dissenting).

D. CONCLUSION

The magistrate judge, after hearing all the evidence, found no credible evidence to contradict Tammy Fair's testimony that she was not advised that she had a right to testify and did not know she had a right to testify. 39a-41a. The district court concluded that "it is more likely than not" that Tammy Fair knew that she had a right to testify, and that she alone decided not to exercise that right. 11a. However, 'more likely than not' is an improper standard for determining whether a defendant has validly waived a fundamental constitutional right. The circuit court ignored the issue of whether an unknowing and involuntary waiver of the right to testify is a structural defect not subject to harmless error analysis, and decided Tammy's appeal by considering only the *Strickland* prejudice prong. The circuit court, by using this approach, effectively held that an unknowing and involuntary waiver of the right to testify is not a structural defect.

Tammy Fair respectfully argues that her unknowing and involuntary waiver of her right to testify is a structural defect in the constitution of the trial mechanism that constitutes a constitutional error "not subject to harmless error [analysis]," *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991), and that "requires automatic reversal of the conviction." *Brecht v. Abrahamson*, 507 U.S. 619, 629-630 (1993). "Failure to inform a defendant of the right to testify constitutes structural error that is per se prejudicial." *Owens v. United States*, 236 F.Supp.2d 122, 143 (D.Mass. 2002).

This Petition for a *Writ of Certiorari* should be granted so that this Court can decide an important question of federal law which has not been, but should be, settled by this Court, i.e., whether an unknowing and involuntary waiver of one's

right to testify is a structural defect not subject to harmless error analysis. Resolution of this federal question in a manner consistent with relevant decisions of this Court is important for uniformity across different federal circuits to insure the fair administration of criminal justice.

Respectfully submitted,

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Appendix

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 05-11631

Non-Argument Calendar

D.C. Docket Nos.02-00022-CV-WCO-2, 99-00033-CR-02

TAMMY FAIR,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Georgia

(October 3, 2005)

Before ANDERSON, BARKETT and MARCUS, Circuit Judges.

PER CURIAM:

Tammy Fair appeals from the district court's denial of her motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255. On appeal. Fair asserts the district court erred in its analysis of her ineffective-assistance-of-counsel claim. Fair argues she established both that her trial attorney's performance was defective because he failed to advise her of her right to testify in her own defense, and that she was prejudiced because her testimony would have changed the result of her trial. We review "a district court's findings of fact in a 28 U.S.C. § 2255 proceeding for clear error, and its legal conclusions de novo." Garcia v. United States, 278 F.3d 1210, 1212 (11th Cir. 2002); see also Williams v. United States, 396 F.3d 1340, 1341 (11th Cir. 2005)(same). After thorough review, we affirm.

We previously affirmed Fair's 188-month sentence and convictions for possession with intent to distribute methamphetamine, in violation of 21 U.S.C. § 841(a)(1), and maintaining a place for the distribution of methamphetamine, in violation of 21 U.S.C. § 856(a)(1). United States v. Fair, 251 F.3d 162 (11th Cir. 2001)(Table). In her § 2255 motion, Fair raised three claims of ineffective assistance of trial counsel, only one of which was designated in the district court's certificate of appealability: whether Fair's trial attorney rendered ineffective assistance by failing to advise her that she had the right to testify in her own defense.[2]

After an evidentiary hearing, at which Fair, her trial counsel, and her husband's trial counsel testified, the magistrate judge entered a Report and Recommendation

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[2] The district court did not designate, and Fair does not make arguments relating to, the other two claims.

(R&R). Applying the familiar two-part test for ineffective assistance of counsel enumerated in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984),[3] the magistrate judge concluded that although Fair satisfied the performance prong of Strickland by showing her counsel's representation was deficient, Fair's proffer of the testimony she would have provided if she had testified was "irrelevant to the jury's determination" of guilt. This finding was based, among other things, on (1) the speculative nature of Fair's argument that the testimony would have made a difference, and (2) the government's cross-examination of Fair at the evidentiary hearing on her § 2255 motion, after which the magistrate judge noted "certain credibility problems." Based on Fair's failure to satisfy her burden on the Strickland prejudice prong, the magistrate judge recommended denial of her § 2255 motion.

The district court adopted the R&R in part and denied Fair's motion. In its order, the district court, applying Strickland, concluded the following:

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[3] In order to prevail on a claim of ineffective assistance of counsel, a petitioner must show (1) counsel's performance fell below an objective standard of reasonableness; and (2) but for the deficiency in representation, there is a reasonable probability that the result of the proceeding would have been different. Strickland, 466 U.S. at 687-88, 694. To satisfy the deficient performance prong, the petitioner has the burden to prove that counsel made errors so serious that he was not functioning as the "counsel" guaranteed by the Sixth Amendment. Id. at 687. The standard for counsel's performance under Strickland is "reasonableness under the prevailing professional norms." Id. at 688-89. The reasonableness of counsel's performance is to be evaluated from counsel's perspective at the time of the alleged error and in light of all the circumstances, and the standard of review is highly deferential. See Mills v. Singletary, 63 F.3d 999, 1020 (11th Cir. 1995)(quotation and citation omitted). To satisfy the prejudice prong, a petitioner must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Strickland, 466 U.S. at 694.

> Given the facts, viewed from the perspective of trial counsel, as they were known to him at the time of the representation, the court concludes that it is more likely than not that trial counsel followed his normal practice with petitioner, that petitioner knew that she had a right to testify, and that petitioner alone decided not to exercise that right. The court finds evidence that petitioner knew that she had a right to testify. Petitioner expressed reluctance about testifying to her trial counsel and never affirmatively requested that she take the stand. In addition, petitioner was present during conversations about whether her husband should testify and knew that he would be waiving his right at trial. The court further questions the magistrate judge's application of [United States v. Teague, 953 F.2d 1525 (11th Cir. 1992)] to require that trial counsel explicitly articulate to a defendant that he or she has a right to testify and that the decision about whether to exercise that right belongs solely to him or her. Rather, the court believes that the focus should be on whether petitioner knew that such a right existed, that the ability to exercise that right was her choice, and that petitioner knowingly and willingly waived that right. Consequently, the court must deviate from the magistrate judge's findings here because it finds that petitioner failed to show that some action or inaction by trial counsel deprived her of "the ability to choose whether or not to testify in [her] own behalf." Teague, 953 F.2d at 1534.

Thus, the district court found that Fair failed to meet the performance prong of Strickland. The court further concluded that the magistrate judge's analysis on the prejudice prong of Strickland was correct. Accordingly, the court denied Fair's motion.

After our thorough review of the record and the parties' briefs, we find no clear error in the findings of fact, or legal error in the district court's analysis, relating to the Strickland prejudice prong.[4] Accordingly, Fair did not satisfy her burden under Strickland and the district court correctly denied her § 2255 motion.

AFFIRMED.

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[4] We need not address the issue of counsel's effectiveness if prejudice is lacking. See Strickland, 466 U.S. at 697 ("[A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant . . . If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice . . . that course should be followed."); Holladay v. Haley, 209 F.3d 1243, 1248 (11th Cir. 2000)("Because both parts of the test must be satisfied in order to show a violation of the Sixth Amendment, the court need not address the performance prong if the defendant cannot meet the prejudice prong, or vice versa." (citation omitted).

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
GAINESVILLE DIVISION

TAMMY FAIR,	:	
	:	
Petitioner	:	CRIMINAL ACTION
	:	NO. 2:99-CR-33-02-WCO
vs.	:	
	:	CIVIL ACTION
UNITED STATES OF AMERICA,	:	
	:	NO. 2:02-CV-22-WCO
	:	
Respondent.	:	

ORDER

The captioned case is before the court for consideration of the magistrate judge's report and recommendation ("R&R") [222-1, 238-1] in which she recommends that petitioner's motion to vacate her sentence pursuant to 28 U.S.C. § 2255 and motions to amend her original petition be denied. Petitioner has filed a timely objection to the R&R on February 22, 2005, which is presently before this court. [239-1].

The facts and procedural history of this case are fully set forth in the R&R and do not need to be repeated except as they relate to petitioner's objections. Petitioner and her husband were convicted by a jury on March 6, 2000, for possession with intent to distribute methamphetamine in violation of 21 U.S.C. §§ 841(a)(1) and maintaining a place for distribution of methamphetamine in violation of 21 U.S.C.

§§ 856(a)(1). The court sentenced petitioner on May 24, 2000, to a term of 188 months in prison, followed by five (5) years of supervised release, and ordered her to pay a $20,000 fine as well as a special assessment of $200. The Eleventh Circuit Court of Appeals affirmed petitioner's conviction and sentence on direct appeal. See United States v. Fair, No. 00-12788 (11th Cir. May 7, 2001).

Thereafter, on February 22, 2002, petitioner filed the instant motion to vacate her sentence pursuant to § 2255, raising three claims of ineffective assistance of counsel: (1) trial counsel failed to advise her of her right to testify and unilaterally decided that she would not testify in her own defense ("Ground I"); (2) trial counsel failed to interview potential witnesses to determine whether they would testify to facts refuting the government's case ("Ground II"); and (3) trial counsel had a conflict of interest (Ground III") [200-1]. The magistrate judge submitted an initial R&R on June 2, 2004, in which she recommended that Grounds II and III of petitioner's ineffective assistance claim be denied and ordered an evidentiary hearing on the issues raised in Ground I [222-1]. Before the evidentiary hearing, petitioner filed two motions to amend her petition to add claims pursuant to Blakely v. Washington, 2004 U.S. LEXIS 4573 (June 24, 2004) [229-1, 225-1]. In these motions, petitioner avers that the court improperly calculated her sentence based upon drug quantities that were not charged in the indictment or proven to a jury beyond a reasonable doubt and enhanced her sentence based on additional allegations of firearms possession and obstruction of justice not admitted by petitioner or proven to a jury beyond a reasonable doubt.

On July 13, 2004, the magistrate judge conducted an evidentiary hearing on the issue of whether trial counsel was ineffective for failing to advise petitioner about her right to testify and on petitioner's motions to amend. The magistrate

judge thereafter gave the parties an opportunity to file briefs further addressing both issues. [233, 236, 237]. Upon consideration of these arguments, on February 11, 2005, the magistrate judge submitted a second R&R recommending that petitioner's motions to amend as well as Ground I of petitioner's motion to vacate pursuant to § 2255 be denied. [238-1].

Neither party has objected to the magistrate judge's initial R&R recommending the denial of Grounds II and III of petitioner's ineffective assistance claim. The court has reviewed the record and is confident that the magistrate judge correctly applied the facts of this case to the relevant law. Accordingly, as it relates to Grounds II and III of petitioner's motion to vacate her sentence, the magistrate judge's report and recommendation of June 2, 2004 [222-1] is hereby **ADOPTED** as the order of this court. The court will therefore proceed to analyze the portions of the magistrate judge's second R&R to which petitioner objects.

I. Petitioner's Right to Testify

The standard for evaluating ineffective assistance of counsel is set forth in Strickland v. Washington, 466 U.S. 668 (1984). To succeed on an ineffective assistance claim, a petitioner must show that: (1) trial counsel's performance was objectively unreasonable and (2) trial counsel's unreasonable performance actually prejudiced petitioner. Strickland, 466 U.S. at 668. In other words, a petitioner must establish that counsel's performance fell below what may be considered "reasonably effective assistance" and "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 687, 694. The court need not, however, address both prongs "if the defendant makes an insufficient showing on one." Id. at 697.

A petitioner must first demonstrate that, "in light of all the circumstances, the identified acts or omissions were outside the range of professionally competent assistance." Id.

at 690. The burden of persuasion is on the petitioner to prove, beyond a preponderance of the evidence, that counsel's performance was unreasonable. Chandler v. United States, 218 F.3d 1305, 1313 (11th Cir. 2000), cert. denied, 531 U.S. 1204 (2001). The court must be "highly deferential" and "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Strickland, 466 U.S. at 689; Atkins v. Singletary, 965 F.2d 952, 958 (11th Cir. 1992)("We also should always presume strongly that counsel's performance was reasonable and adequate."). Here, petitioner maintains that she received ineffective assistance from trial counsel, who allegedly failed to advise petitioner that she had a right to testify and that the ultimate decision about whether to testify belonged to her. Because she was not given this advice, petitioner argues, she did not knowingly and willingly waive her right to testify.

"[A] criminal defendant has a fundamental constitutional right to testify in his or her own behalf at trial. This right is personal to the defendant and cannot be waived either by the trial court or by defense counsel." United States v. Teague, 953 F.2d 1525, 1532 (11th Cir.)(en banc), cert. denied, 506 U.S. 842 (1992). As a result, an attorney's performance would be deficient under the first prong of the Strickland test if counsel refused to accept the defendant's decision to testify and did not call him to the stand or, alternatively, if defense counsel never informed the defendant of the right to testify and that the ultimate decision belonged to the defendant. Id. at 1532.

Applying the above standards, the magistrate judge concluded that petitioner was able to show that trial counsel did not advise petitioner of her right to testify at trial and thus demonstrated that trial counsel's performance was deficient under the first prong of Strickland. (R&R, at 34, 37). At the evidentiary hearing on July 13, 2004, petitioner stated under

oath that she did not know she had such a right, or that the ultimate decision whether to testify was her own, and that trial counsel did not so advise her. (Hr'g Tr., at 94, 119). Specifically, she stated that she was not "told that it was important, that [she] needed to testify, that it could help [her], that it was [her] right." (Id. at 94). When asked what she would have said at trial that was not presented by other witnesses, petitioner replied that she would have testified that she was not in the house on the day of the search and that she was a drug user but took no part in selling drugs. (Id. at 117-18).

On his behalf, trial counsel testified that petitioner's trial was his first federal criminal trial since being admitted to the Georgia Bar approximately thirteen (13) months earlier.[5] Trial counsel admitted that he was familiar with petitioner's Sixth Amendment right to testify and knew that it was petitioner's decision whether to testify. (Id. at 68). Trial counsel further stated that, while it was "his ordinary course of business to advise clients of this right," he could not say that he did so in petitioner's case. (Id. at 71-72). Trial counsel could recall only that, in a conversation with petitioner early in his representation, petitioner indicated that she was reluctant to testify, was not interested in testifying, and was anxious or afraid about testifying. (Id. at 62-66). While he did not remember telling petitioner that she could not testify, trial counsel also averred that, if petitioner had expressed a desire to testify, he would have discussed the matter with her and prepared her to testify if necessary. (Id. at 62, 67, 123-25).

Gus McDonald ("McDonald"), trial counsel for petitioner's husband, also testified at the evidentiary hearing. McDonald stated under oath that this was his first federal trial

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[5] The court notes that the R&R, and perhaps trial counsel's testimony at the evidentiary hearing, does not indicate whether or to what extent trial counsel has participated in criminal trials on the state court level.

as "first chair" and that he had assisted petitioner in obtaining trial counsel. Moreover, McDonald recalls conducting up to eight pretrial meetings during which petitioner and trial counsel were present. (Id. at 43-44). At one or more of these meetings, McDonald spoke with petitioner's husband about whether he should testify and advised him against taking the stand because McDonald felt it would do nothing to help the case and would have contradicted the defense's theories. (Id. at 27-38, 41, 43). In his testimony, petitioner's trial counsel also remembered these meetings, noting that McDonald and Fair usually dominated the conversations. (Id. at 59-60). In fact, trial counsel recalls speaking with petitioner only once before trial outside her husband's presence and only tow or three times outside his presence during the trial. (Id. at 61).

Given the facts, viewed from the perspective of trial counsel, "as they were known to [him] at the time of the representation," the court concludes that it is more likely than not that trial counsel followed his normal practice with petitioner, that petitioner knew that she had a right to testify, and that petitioner alone decided not to exercise that right. Teague, 953 F.2d at 1535. See also Strickland, 466 U.S. at 689; Chandler, 218 F.3d at 1313; Atkins, 965 F.2d at 958. The court finds evidence that petitioner knew that she had a right to testify. Petitioner expressed a reluctance about testifying to her trial counsel and never affirmatively requested that she take the stand. See Gallego v. United States, 174 F.3d 1196, 1197 (11th Cir. 1999)(finding counsel ineffective where, despite a defendant's repeated requests to testify, counsel prevented him from doing so by not making the defendant aware of his right to testify); Teague, 953 F.2d at 1535. In addition, petitioner was present during conversations about whether her husband should testify and knew he would be waiving his right at trial. The court further questions the magistrate judge's application of Teague to require that trial counsel explicitly articulate to a defendant that he or she has

a right to testify and that the decision about whether to exercise that right belongs solely to him or her. Rather, the court believes that the focus should be on whether petitioner knew that such a right existed, that the ability to exercise that right was her choice, and that petitioner knowingly and willingly waived that right. Consequently, the court must deviate from the magistrate judge's findings here because it finds that petitioner failed to show that some action or inaction by trial counsel deprived her of "the ability to choose whether or not to testify in [her] own behalf." Teague, 953 F.2d at 1534.

With that said, however, the court still **APPROVES** the magistrate judge's recommendation regarding Ground I of petitioner's ineffective assistance claim as the order of this court. The magistrate judge found, and this court agrees, that petitioner failed to show that trial counsel's deficient performance actually prejudiced her. (R&R, at 45). To meet the second prong of Strickland, a petitioner must demonstrate that counsel's unreasonable acts or omissions caused prejudice. 466 U.S. at 691. "An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." Id. That is, the petitioner "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694.

Petitioner has failed to demonstrate that there is a reasonable probability that had she testified, the result of her trial would be different. In fact, petitioner's testimony at the evidentiary hearing reveals credibility problems that would have arisen at trial. Petitioner stated that she would have testified that she was never involved in selling drugs. Yet, she

simultaneously admitted to using drugs before and after her arrest and to failing two drug tests while on bond awaiting trial. (Hr'g T., at 95-96, 98, 102-103). Moreover, petitioner's proposed testimony that she did not own the house and was not there on the day of the search would have been irrelevant to the ultimate issue of whether she was guilty of maintaining a place for the use and distribution of methamphetamine. (Id. at 117-18). As a result, the court finds that petitioner's allegations of prejudice are mere speculation and insufficient to satisfy Strickland's second prong.

Despite its hesitation to find trial counsel's performance deficient, the court is nonetheless confident that the magistrate judge's recommendation ultimately reaches the correct conclusion here. Accordingly, the court hereby **ADOPTS** as the order of the court the magistrate judge's recommendation of June 2, 2004 [222-1] that Ground I of petitioner's ineffective assistance claim be **DISMISSED**.

II. Petitioner's Motions to Amend to Add Blakely Claims

Petitioner has also moved to amend her § 2255 petition to assert that the Supreme Court's decision in Blakely v. Washington, 2004 U.S. LEXIS 4573 (June 24, 2004)[6] renders her sentence under the Sentencing Guidelines incompatible with the Sixth Amendment and therefore unconstitutional. Section 2255 explicitly provides that a petitioner has one year from the entry of final judgment of conviction to move for a writ of habeas corpus. 28 U.S.C. 2255 ("The limitation

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[6] Subsequently, in United States v. Booker, 2005 U.S. LEXIS 628 (Jan. 12, 2005), the Supreme Court held that there was no distinction between the federal Sentencing Guidelines and the Washington procedures held unconstitutional in Blakely. Nevertheless, the same analysis applies to petitioner's motion under both Blakely and Booker.

period shall run from the latest of . . . the date on which the judgement of conviction becomes final . . .."). As the magistrate judge correctly noted, petitioner's conviction became final when the United States Supreme Court denied her motion for certiorari on October 1, 2001. Petitioner filed her original § 2255 motion on February 22, 2002, within the one-year limitations period but submitted the two motions to amend in July 2004, clearly outside the one-year window.

Petitioner argues, however, that pursuant to Rule 15(c) of the Federal Rules of Civil Procedure, leave to amend should be granted because the amended claims relate back to her original motion to vacate. See FED. R. CIV. P. 15(c) (stating that to relate back, the claims asserted in the amended motion must have "[arisen] out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading . . . ."); Davenport v. United States, 217 F.3d 1341, 1342-44 (11th Cir. 2000) ("[T]he untimely claim must have arisen from the 'same set of facts' as the timely filed claim, not from separate conduct or a separate occurrence in both 'time and type.'"). The magistrate judge concluded, and the court agrees, that petitioner's motions to amend her claims to challenge her sentence under Blakely do not arise from the same set of facts as, and do not relate back to, her original ineffective assistance of counsel claims. (R&R, June 2, 2004, at 49)

Petitioner also contends that regardless of whether her amended claims relate back under Rule 15(c), Federal Rule 15(a) and Blakely require that the court grant leave to amend to impart justice by correcting petitioner's unconstitutional sentence. See FED. R. CIV. P. 15(a) (providing that, after a responsive pleading has been served, "a party may amend the party's pleading only by leave of court of by written consent of the adverse party; and leave shall be freely given when justice so requires:); Blakely, 2004 U.S. LEXIS 4573 (June 24, 2004). See also United States v. Booker, 2005 U.S.

LEXIS 628 (Jan. 12, 2005) (applying Blakely to the Federal Sentencing Guidelines). The court again concurs with the magistrate judge, however, that petitioner has failed to demonstrate that Federal Rule 15(a) requires the court to allow the amendment of her original § 2255 motion.

The court also notes that the Eleventh Circuit has held that Blakely and Booker cannot be applied retroactively on collateral review. See Varela v. United States, 2005 U.S. App. LEXIS 2768 (11th Cir. Feb. 17, 2005) (holding that Booker is not retroactive to cases on collateral review); In re Anderson, 2005 U.S. App. LEXIS 1097 (11th Cir. Jan. 21, 2005)(same); In.re Dean, 375 F.3d 1287, 1290 (11th Cir. 2004) (holding that Blakely is not retroactive to cases on collateral review). See also Schriro v. Summerlin, 2004 U.S. LEXIS 4574 (June 24, 2004) (holding that Apprendi is not retroactive to cases on collateral review); Ring v. Arizona, 536 U.S. 584 (2002) (same); McCoy v. United States, 266 F.3d 1245, 1256-58 (11th Cir. 2001) (same), cert. denied, 536 U.S. 906 (2002). Because a habeas petition constitutes a form of collateral review, petitioner's claims under Blakely and Booker are barred by the § 2255 provision precluding second or successive petitions. Moreover, even if § 2255 permitted petitioner to assert these claims, these claims would be denied because Blakely and Booker would otherwise be inapplicable and irrelevant to matters on collateral review. For the reasons stated above and in the R&R, the court **ADOPTS** as the order of the court the magistrate judge's recommendation that petitioner's motions to amend be **DENIED** [238-1].

III. Conclusion

Subject to the preceding analysis, the court hereby **ADOPTS** the report and recommendation [222-1, 238-1] of the magistrate judge as the order of this court. Petitioner's motions to amend [229-1, 225-1] are **DENIED**.

Furthermore, petitioner's motion to vacate her conviction and sentence pursuant to 28 U.S.C § 2255 [200-1] is **DENIED**.

IT IS SO ORDERED, this 22nd day of March, 2005.

s/William C. O'Kelley

William C. O'Kelley

Senior United States District Judge

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
GAINESVILLE DIVISION

TAMMY FAIR,	:	MOTION TO VACATE
Movant,	:	
v.	:	CRIMINAL NO. 2:99-CR-33-2
UNITED STATES OF AMERICA,	:	CIVIL ACTION NO.
Respondent.	:	2:02-CV-22-WCO

MAGISTRATE JUDGE'S FINAL REPORT AND RECOMMENDATION

I. Background and Procedural History

Movant, who is currently incarcerated in the Federal Prison Camp in Lexington, Kentucky, filed the instant motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255. [Doc. 200]. She was convicted by a jury on March 6, 2000 of possession with intent to distribute methamphetamine in violation of 21 U.S.C. §§ 841(a)(1) and of maintaining a place for the distribution of methamphetamine in violation of 21 U.S.C. §§ 856(a)(1).[7] [Doc. 140; see also Doc. 51]. On May 24, 2000, she was sentenced to 188 months' imprisonment to be followed by five (5) years of supervised release, a $20,000.00 fine, and a special assessment of $200.00. [Doc. 165].

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[7] Movant was indicted and tried with her husband, Paul Fair.

In the original motion to vacate, Movant raised three claims of ineffective assistance of counsel: (1) trial counsel failed to advise her of her right to testify, and unilaterally made the decision that Movant would not take the stand to testify in her own defense; (2) trial counsel failed to interview numerous potential witnesses to determine if they would testify to facts refuting the Government's case-in-chief; and (3) trial counsel had an inherent conflict of interest. [Doc. 200].

On June 2, 2004, by Report and Recommendation, the undersigned recommended that Grounds 2 and 3 of the motion to vacate be denied, and ordered an evidentiary hearing with respect to Ground 1. [Doc. 222].[8] The evidentiary hearing was originally scheduled for July 1, 2004, but was rescheduled for July 13, 2004. [Id.; Doc. 223].

On July 12, 2004, one day before the evidentiary hearing, Movant filed a motion to amend the petition [Doc. 229] to add claims pursuant to Blakely v. Washington, __ U.S. __, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), which was decided June 24, 2004. On the day of the hearing, Movant filed a second motion to amend the petition based on a Blakely claim. [Doc. 225]. In Blakely, the United States Supreme Court held that the petitioner's Sixth Amendment rights were violated because the facts supporting enhancement of the petitioner's sentence beyond the statutory maximum were not found by a jury beyond a reasonable doubt. Based on Blakely, Movant now claims that this court improperly calculated her sentence based upon drug quantities that were not charged in the indictment and proven to a jury beyond a reasonable doubt

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[8] The undersigned notes that the statutes under which Movant was convicted were incorrectly cited in the previous Report and Recommendation. [See Doc. 222, p. 2]. The correct citations are 21 U.S.C. § 841(a)(1) and 21 U.S.C. § 856(a)(1).

and enhanced her sentence[9] based on the presence of firearms and obstruction of justice, though these facts were not admitted by the Defendant or proven to a jury beyond a reasonable doubt. [Docs. 229, 225].

On July 13, 2004, the undersigned conducted an evidentiary hearing on the sole issue of whether trial counsel was ineffective for failing to advise Movant about her right to testify. At the hearing, the undersigned heard argument on whether the motion to amend should be treated as a successive petition because it was not filed within the one-year limitation period. (Hearing transcript,[10] Doc. 232, pp. 8-9). Following the evidentiary hearing, Movant and the Government filed briefs addressing both the issue of whether Movant's trial counsel had failed to advise her of her right to testify and the motions to amend. [Docs. 233, 236, 237].

II. Standard of Review

Congress enacted § 2255, authorizing the filing of motions to correct sentences that violate federal law, with the intention that the statute serve as the primary method of collateral attack on federally-imposed sentences. United States v. Jordan, 915 F.2d 622, 625 (11th Cir. 1990), cert. denied, 499 U.S. 979 (1991). "Pursuant to § 2255, individuals sentenced by a federal court can attack the sentence by claiming one of four different grounds: '(1) that the sentence was imposed in violation of the Constitution or laws of the United States; (2) that the court was without jurisdiction to

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[9] The calculations based on drug quantity and the enhancements based on the presence of firearms and obstruction were made pursuant to the United States Sentencing Guidelines. See Transcript of May 19, 2000 sentencing, pp. 25, 119-20, 122.

[10] References to the Evidentiary Hearing Transcript will be indicated as "HT___."

impose such sentence; (3) that the sentence was in excess of the maximum authorized by law; and (4) that the sentence is otherwise subject to collateral attack.'" Id. (Quoting Hill v. United States, 368 U.S. 424, 426-27 (1962)); see also United States v. Hayman, 342 U.S. 205 (1952).

To obtain collateral relief a prisoner must clear a significantly higher hurdle than would exist on direct appeal." United States v. Frady, 456 U.S. 152, 166 (1982). Movant must establish that the facts surrounding her claim present "exceptional circumstances where the need for the remedy afforded by the writ of habeas corpus is apparent." Bowen v. Johnston, 306 U.S. 19, 27 (1939).

III. Discussion

A. Remaining Ineffective Assistance of Counsel Claim - Counsel's Failure to Advise Movant of Her Right to Testify

1. Ineffective Assistance of Counsel Standard

The standard for evaluating ineffective assistance of counsel claims was set forth in Strickland v. Washington, 466 U.S. 668 (1984). The analysis is two-pronged, and the court may 'dispose of the ineffectiveness claim on either of its two grounds." Atkins v. Singletary, 965 F.2d 952, 959 (11th Cir. 1992), cert. denied, 515 U.S. 1165 (1995); see Strickland, 466 U.S. at 697 ("There is no reason for a court deciding an ineffective assistance claim. . .to address both components of the inquiry if the defendant makes an insufficient showing on one.").

Movant must first show that, "in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." Strickland, 466 U.S. at 690. The court must be "highly deferential," and must "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable

professional assistance. . . ." Id. at 689. Furthermore, a "[s]trategic decision. . .will be held to constitute ineffective assistance 'only if it was so patently unreasonable that no competent attorney would have chosen it.'" Kelly v. United States, 820 F.2d 1173, 1176 (11th Cir.)(citation omitted), cert. denied, 484 U.S. 966 (1987).

To satisfy the second prong, Movant must also demonstrate that counsel's unreasonable acts or omissions prejudiced her. See Strickland, 466 U.S. at 694. That is, Movant "must show that there is a reasonable probability that, but for the counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id.

With these standards in mind, this court will address Movant's claim that trial counsel provided constitutionally ineffective assistance because trial counsel failed to advise Movant that she had a right to testify and that the ultimate decision belonged to her. (Bench Brief, Doc. 233, p. 8). Because she was not given that advice, Movant argues, she did no knowingly and voluntarily waive her right to testify. (Id.).

2. Summary of Evidence Presented at Trial[11]

At Movant's trial, the Government called several witnesses, including several law enforcement agents and officers who testified about a search of the Fairs' residence on August 14, 1998 and individuals who had engaged in drug transactions at the Fairs' residence:

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[11] References to trial testimony are designated as "TT___." The undersigned has not summarized all of the trial testimony or discussed every witness who testified, but has attempted to focus on the testimony most relevant to Movant and her claim that her counsel was ineffective for failing to advise her that she had a right to testify.

a. Carlos Bob Napier

Napier testified that he met with GBI Agent Randall Kersay about cooperating with the GBI in exchange for assistance in getting Napier's sentence reduced on some burglary cases. (TT 335-36). Napier made controlled purchases of methamphetamine, generally one-eighth of an ounce (commonly referred to as an "eight-ball") packaged in small zip-lock bags, from Paul Fair at Fair's residence on several occasion, including May 5, 1998, May 13, 1998, May 28, 1998, June 9, 1998, June 25, 1998 and July 31, 1998. (TT 336, 351, 362, 369, 377-79, 381, 390, 395, 402-404, 407, 413). Napier tape-recorded these transactions on a hidden tape recording system. (See TT 336-38, 369-70, 377, 390, 400, 407). Napier indicated that Movant was not involved in these transactions (TT 364, 373, 375,399,404,566,571-72, 578, 580,583), although she was often present at the house when they were occurring. (TT 373, 390, 411). Napier testified that some of these transactions occurred in a large bathroom in the Fairs' house. (TT 402—03, 407, 411). Napier said that Fair retrieved the methamphetamine from a plastic "Tupperware" container from a drawer under the bathroom sink. (TT 404). On one occasion, Fair had methamphetamine on a mirror on the vanity in the bathroom and took a line, but Napier testified that he "blew" his line instead of taking it. (TT 412-13).

b. Search of Fairs' Residence

Several agents and officers from the GBI, the Northeast Georgia Drug Task Force and other law enforcement agencies testified about the execution of a search warrant at the Fairs' residence on August 14, 1998. As the search of the residence began, Paul Fair and an acquaintance, Mike Peebles, were handcuffed and searched. (TT 679, 917, 1677). The following items were found and seized during the search: a pill bottle with Movant's name on it containing a plastic

"baggy" with methamphetamine residue which was found in a bureau in the master bedroom; 2 small baggies of methamphetamine in the night stand area in the master bedroom; a camera bag found in the master bedroom closet with a small baggy of methamphetamine residue or small amount of methamphetamine and a small knife; a yellow plastic container under the sink in the master bedroom containing 4 zip-lock plastic bags with methamphetamine; two digital scales, a mirror with a cut line of methamphetamine residue, a razor blade, a sifter, spoons, a box of empty zip-lock bags[12] and a bottle of Inositol powder[13] found in the master bathroom; a baggy of methamphetamine found inside a box or bottle of Nix lice shampoo; baggies of methamphetamine found in a green overnight bag in a wardrobe inside the master bathroom; a small baggy of methamphetamine in a potpourri jar in back of the toilet; a green jar found on a kitchen shelf with small baggies containing methamphetamine; a piece of tinfoil found in the refrigerator beneath the crisper drawers containing a small quantity of methamphetamine; a baseball cup found in a drawer in the basement that contained a small zip-lock bag of methamphetamine residue; a mirror and straw found in the same drawer as the baseball cup. (TT 726-28, 731, 732-35, 741, 852-53, 855, 858-59, 874-75, 877-79, 1007-08, 1009, 1011, 1013-15, 1018, 1022, 1028, 1030, 1031, 1033, 1035, 1039-40, 1761-65).

They also found and seized large sums of cash throughout the house, including $6,889 on Paul Fair's person; a bag with stacks of money wrapped in rubber bands totaling

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[12] The box that the bags were found in was a syringe box with the name "Pearl A. Wall" on it. (TT 1018).

[13] Inositol is a vitamin supplement and is also used to cut methamphetamine. (TT 1821).

$100,000 in an attic crawlspace; $2110 that was found in a nightstand in the master bedroom; $700 found in a green pouch in the master bedroom closet; and $800 found in a drawer in the master bathroom. (TT 808, 811, 918, 945-97, 1013, 1055). A five-dollar bill that had been provided to Napier for the June 25, 1998 transaction was also found in a green pouch in the master bathroom closet. (TT 1702, 1705).

They also found and seized 9 firearms, including 5 handguns in a safe in the master bedroom closet (TT 881-83); a handgun found in the master bedroom closet (TT 947); a revolver found in the master bedroom nightstand drawer (TT 948); a .12 Sears single-barrel shotgun and a Browning .22 rifle found in a corner of the master bathroom (TT 1053). They also found and seized night vision equipment from the living room; a notebook in the basement; an address book on a table in the living room; a cassette from a video recorder[14]; and some newspaper in a trash can in the bathroom with duct tape on it. (TT 736-37; 806-07, 827, 920-21, 1697-98, 1738).

c. <u>Agents Gutierrez and Martinez</u>

The Government presented the testimony of Johnny Gutierrez, a Senior Patrol Agent with the United States Border Patrol, and Gabriel Martinez, Jr., a task force agent with the DEA, concerning the arrest of Paul Fair and Movant in September 1990 in Texas. (TT 1139-1226). According to Gutierrez, Mr. Fair and his then-girlfriend Tammy Lathan (i.e., Movant) were traveling in a vehicle behind a wagon driven by Mr. Fair's relative, Ronnie Fair, in which more than 50 pounds of marijuana was found. (TT 1143-48). Mr. Fair and Movant were also arrested, and Movant's purse was searched. (TT 1147-48). The search revealed a small amount

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[14] No discernible pictures were obtained from the videotape. (TT 1699).

of suspected marijuana in a prescription bottle; white pills in a Tylenol bottle; a tan powdery substance in a small bag; $1,250 in cash; a 4-inch dagger; and a Tampax box with less than an ounce of marijuana. (Id.) Martinez questioned Movant, who denied knowing anything about the marijuana, but said she bought the methamphetamine (i.e., the powdery substance) from an unknown female. (TT 1186).

d. Ronald Schandera

Mr. Schandera testified that he agreed to cooperate with the GBI and the FBI with the understanding that his pending drug charges would not be prosecuted in federal court. (TT 1283). Schandera testified that sometime prior to June 1998, he and someone named Antonio Reyes went to the Fairs' house with one pound of methamphetamine in a plastic zip-lock bag. (TT 1285-86, 1346). Schandera admitted that he was a user, and that he had tested some of the methamphetamine on the way to the Fairs' house. (TT 1286). An individual named Bud Guyton and an Hispanic male also accompanied Schandera in another car. (TT 1287). Schandera testified that when they arrived, Mr. Fair's wife, who he described as tall with brown hair and in her mid-40's, led them downstairs to the basement. (TT 1288). She told the men that Mr. Fair was asleep and she went upstairs to get him. (TT 1289). Mr. Fair sampled the methamphetamine, and the Hispanic man showed them how to "re-rock" the methamphetamine, i.e., mix methamphetamine in with a cutting agent, melt it and then freeze it. (TT 1289-1290). The methamphetamine was put in a "Tupperware" container that Movant brought to them; however, it is not clear from the testimony whether Movant was present during the "re-rocking." (TT 1290-91, 1375).

e. David Dowdle

Dowdle testified that he had pled guilty to a felony drug charge in Tennessee, but had not been sentenced yet, and part

of his plea agreement in the Tennessee case was that he would testify and cooperate in the instant case. (TT 1454-55). Dowdle testified that he met Paul Fair in 1992 or 1993 through Fair's car business. (TT 1420). In the late summer of 1997, Dowdle began engaging in drug transactions with Mr. Fair. (Id.). He went to the Fairs' residence with Billy Joe Holbrooks, a friend who repossessed cars for Fair, and Dowdle bought 2 ounces of methamphetamine from Fair that day for $3000. (TT 1420-23). Dowdle said that the transaction occurred in the basement, and that in addition to himself and Mr. Fair, Movant and Holbrooks were also present. (TT 1423). Mr. Fair sent Movant upstairs to retrieve the methamphetamine, and she returned with 2 ounces. (Id.).

Dowdle returned to the Fairs' house in August 1997 when he bought 4 ounces of methamphetamine, and Mr. Fair showed him how to "re-rock" the methamphetamine. (TT 1424). Movant retrieved the methamphetamine, which was in a small box-like container wrapped in black tape. (TT 1425, 1440). Mr. Fair then opened the container and there was a plastic bag with what Fair said was a pound of methamphetamine in it. (TT 1425-26). He put the contents in a stainless steel pot, then put 4 ounces of the Inositol powder in and melted it down. (TT 1426). After it was melted, he put it in a "Tupperware" container with a lid and put it in the freezer. (TT 1427). After it formed a brick, Mr. Fair cut off 6 ounces and charged Dowdle for 4 ounces since 2 ounces was "cut." (TT 1428).

Dowdle returned a week to 10 days later to buy 4 ounces, (Id.). This transaction occurred in the master bedroom. (Id.). Mr. Fair retrieved the methamphetamine from a drawer under the sink and weighed the methamphetamine there, using digital scales. (TT 1429-30). Dowdle observed a bag containing smaller bags with differing amounts of methamphetamine. (TT 1431). Mr. Fair, Movant, Holbrooks

and Dowdle "[did] some lines," and Dowdle paid Mr. Fair, who then gave the money to Movant. (Id.).

Dowdle returned to the Fairs' residence the next day after his attempt at re-rocking went awry so that Mr. Fair could assist him in "straighten[ing] it out." (TT 1433-35). They had finished re-rocking the methamphetamine in the basement when Movant arrived, and upon hearing what happened, Movant commented that Mr. Fair had done the same thing. (TT 1435).

A couple of weeks later, Dowdle returned to the Fairs' house to finish paying Mr. Fair and to talk about buying 8 ounces of methamphetamine, which would cost $10,000. (TT 1441). Dowdle told Mr. Fair that he did not have that much money with him, so he came back the next morning. (TT 1442). Dowdle, Mr. Fair, Movant and Holbrooks were in the bathroom, and when Dowdle gave the money to Mr. Fair, he gave it to Movant, who went into the master bedroom. (Id.).

During the next trip Dowdle made to the Fairs' house, he purchased 8 ounces of methamphetamine from Mr. Fair. (TT 1443). Movant was not present on that occasion. (Id.).

A few weeks later, Dowdle purchased "white meth" from Mr. Fair, but the quality was not as good, so Dowdle took it back to the Fairs the next day. (TT 1447-48). Mr. Fair and Movant were sitting at the bar, and Mr. Fair asked Movant to bring them a sample of methamphetamine, which she did, and they (Mr. Fair, Movant, Holbrooks and Dowdle) sampled it. (TT 1449). At one point, Mr. Fair became angry, asked if Dowdle was calling him a liar and reached for a butcher knife. (TT 1449-50). Movant put her hand on Mr. Fair's hand and told him that it was just as much his fault. (TT 1450).

Dowdle returned on a later date to purchase 4 ounces of methamphetamine, but Movant was not present on that occasion. (TT 1450-51). A month or so later Dowdle

returned to the Fairs' house and gave Mr. Fair 2 ounces of methamphetamine to pay down a debt Dowdle owed him. (TT 1452-53). There were no more trips to the Fairs' house after that. (TT 1454).

f. Byron Portillo

Portillo testified that he pled guilty to federal drug charges, had some charges dismissed and was sentenced to 270 months. (TT 1574). He stated that he was told that if he cooperated and testified truthfully in this case, his sentence might be reduced. (TT 1575). Portillo testified that he met Paul Fair in 1996 through a friend named "Jessie." (TT 1555). The first time Portillo met Fair was at Fair's car dealership. (Id.). The next time Portillo met Fair was at Fair's house when Portillo went there for a drug transaction. (TT 1557). Portillo and Jessie went there to sell Fair two pounds of methamphetamine for $14,000 a pound. (TT 1558-59). Portillo returned to Fair's house on another occasion, without Jessie, to sell him another two pounds of methamphetamine. (TT 1559). On yet another occasion, Portillo sold Fair two pounds of methamphetamine in the basement of Fair's house. (TT 1560). Portillo said that he and Mr. Fair also engaged in drug transactions in the master bedroom. (TT 1561-62). Portillo said that Movant was in the house when the transactions occurred, but she was not present during the actual transactions. (TT 1563). After Portillo gave Mr. Fair the drugs, Mr. Fair would shout to Movant to bring him the money, and she would bring the money in a cloth bag to the basement or the bathroom, wherever the transaction was occurring. (TT 1563-65, 1603). The money was bundled in packs of $100 bills wrapped in rubber bands. (TT 1580). Portillo stopped dealing with Mr. Fair after Portillo was stopped with two pounds of methamphetamine on his way to Fair's house. (TT 1567, 1571).

g. Defense Witnesses

The defense called several acquaintances of the Fairs:

(1). Joanne Darnel

Ms. Darnel testified that she worked as Paul Fair's bookkeeper and secretary in the office of his car business, located about two and a half miles from the Fairs' house, from June 6, 1995 through May 6, 1998. (TT 1827, 1838). She testified that she handled the finances for Mr. Fair's car business, made bank deposits, kept his records and did the "title work." (TT 1827-28). She testified that Jessie Castillo and Byron Portillo brought other people to the lot to purchase cars in exchange for "bird dog fee[s]." (TT 1827-29). She testified that David Dowdle bought cars from Mr. Fair and borrowed money from him. (TT 1830). She testified that 80 percent of transactions were made in cash and that Mr. Fair kept cash on him. (TT 1833, 1835). She said that Movant previously did the job Darnell did, and that Movant showed her how to do the job. (TT 1832). Darnel was not present at the Fairs' house on August 14, 1998 when the search occurred and had no information about what happened. (TT 1841).

(2). Buddy McKay

Mr. McKay had worked for Mr. Fair as a mechanic for three years. (TT 1845). He testified that the week prior to August 14, 1998, Mike Peebles paid him in the driveway of Paul's house because Fair was on vacation. (TT 1845-46).

(3). Ralph Owens

Mr. Owens testified that he was arrested and convicted for possessing methamphetamine ("crank") on August 14, 1998. (TT 1851-52). Owens testified that he went to Mr. Fair's house on that date to see if Fair was back from vacation and was greeted by Mike Peebles. (TT 1852-53). Owens and Peebles sat and talked and "did" lines of meth, which Peebles

got from the bedroom or bathroom. (TT 1853-54). Peebles showed Owens some meth he had for sale, which was in a yellow container. (TT 1855). Owens left, but returned to the Fairs' residence and was met by GBI agents, who found drugs in his pocket and arrested him. (TT 1858-60). Owens was arrested again two weeks later and again charged with possession of methamphetamine. (TT 1861, 1863), He pled guilty to the charges against him. (TT 1863).

(4). Gail Peebles

Ms. Peebles testified that her husband was Mike Peebles, and that his aunt was Pearl Wall. (TT 1867).[15] She said that Mr. Peebles would "house-sit" for the Fairs when they were out of town. (TT 1868). Mr. Peebles was staying at the Fairs' house the week prior to the search on August 14, 1998. (TT 1869). She knew that her husband used drugs, and he appeared to be using drugs that week. (TT 1869, 1887-88).[16] Ms. Peebles was not present at the Fairs' house on August 14, 1998, and she testified that she "rarely went to the Fair home." (TT 1889).

(5). Dawn Rene Hunter

Ms. Hunter testified that she lives in a trailer behind the Fairs' house and that her daughter had gone on vacation with the Fairs on August 2, 1998 and returned August 14, 1998. (TT 1911-1912). Mike Peebles was staying at the Fairs' house while they were gone. (TT 1912-13). Mr. Fair came home from vacation separately from Movant. (TT 1913-14).

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[15] A GBI agent testified that he had found a box of zip-lock bags in the Fairs' bathroom with the name "Pearl A. Wall" on it, during the August 14, 1998 search of the Fair residence. (TT 1018).

[16] Ms. Peebles explained that she was a "drug counselor' and had been a recovering drug addict for 18 years. (TT 1890).

3. Evidence Presented at the Evidentiary Hearing[17]

a. Lawrence Allyn Stockton

At the evidentiary hearing on the instant motion, Lawrence Allyn Stockton testified that he was contacted by Paul Fair, movant's husband and co-defendant, on the date of the search of the residence, August 14, 1998, and that Stockton then assisted Mr. Fair in retaining Gus McDonald to represent him. (HT 12-13, 14-16). Stockton did not participate as trial counsel, but he sat at counsel table during trial. (HT 18-19). He was present during a meeting with Movant's trial attorney, Mr. Tyrone, and Movant during the trial. (HT 20-21), during which Tyrone told Movant something to the effect of "you can't testify, it's going to kill Paul" or "you're going to sink him if you testify." (HT 20-22, 32).[18] Stockton stated that Tyrone might have also said to Movant, "look, you'll sink yourself, too, because they'll ask you about this, you know, and prior things and stuff," but the "gist" was she could not testify. (HT 33). Stockton did not recall Movant expressing a desire to testify. (Id.). Stockton testified that Movant was never advised, in Stockton's presence, of her right to testify, although he admitted that he was not present every time Tyrone and Movant met during pretrial meetings. (HT 22, 25).

He testified that during the trial, he was present for all meetings except one day when he was at the Court of Appeals. (HT 25). Stockton was present at meetings during which Mr. Fair discussed testifying, but lawyers told Mr. Fair "you can't testify; look, they're going to bury you as soon as they hear

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[17] References to the testimony presented during the hearing are designated as "HT___."

[18] Mr. Fair and his attorney, Mr. McDonald, were not present during this meeting, and Stockton could not say why he was present. (HT 20-21, 27).

that voice from your mouth on the stand and compare it to those hours of voices on those tapes, you can't testify, you can't stand the heat." (HT 29, 31). Stockton could not say that the lawyers made the decision that Mr. Fair would not testify, but it was "strongly argued' that he could not testify, and Stockton believed it was a "terrible idea" for Mr. Fair to testify. (HT 21-32). Stockton could not say whether Movant was present during all of these conversations. (HT 30).

b. Gus McDonald

Gus McDonald, Mr. Fair's trial counsel, also testified at the hearing. He assisted Movant with obtaining counsel, attorney Ed Garland's firm (Garland, Samuel & Loeb), because he had tried cases in the past with that firm and wanted someone that did a lot of federal litigation. (HT 36). This was McDonald's first federal trial as "first chair." (HT 40). Tyrone was an associate with Garland, Samuel & Loeb; he had not tried a federal case at that point. (HT 36-37). Neither Garland or Samuel appeared during the trial. (HT 37). McDonald had conversations with Mr. Fair about testifying, but doubts he would have advised Movant what she should do. (HT 37-38). He had joint meetings with Tyrone, and Movant might have been present when they talked about Mr. Fair testifying. (HT 38). McDonald did not want Mr. Fair to testify and he would have told him that testifying would do nothing to help the case and would have probably contradicted the defense theory as to whose voice was on the Government's audiotapes. (HT 38, 41). McDonald did not think that Mr. Fair ever asked to testify, and McDonald did not think that he ever told him that he could not testify, although he admitted that they had "very pointed and candid discussions" about whether Mr. Fair should testify, and that it was McDonald's advice that Mr. Fair should not testify. (HT 43, 50). McDonald did not recall whether these conversations occurred prior to trial, but he thought these discussions

occurred "at the 11th hour" at the end of trial, and he believed that Movant would have been present for them. (HT 51).[19]

McDonald denied that he prevented Tyrone from engaging in trial preparation or pursuing a trial strategy or that he told Tyrone not to do something on behalf of his client because it would adversely affect Mr. Fair. (HT 47, 49). He also denied controlling what Tyrone did or did not do on behalf of Movant. (Id. at 49).

c. Nelson Otis Tyrone

Mr. Tyrone, Movant's trial counsel, testified that he had passed the bar in October 1998 and was sworn in within a few days thereafter, approximately 13 months prior to beginning his representation of Movant. (HT 53, 68). He began practicing law in the firm of Garland, Samuel & Loeb as a criminal defense attorney. (HT 53). Movant's trial was his first federal criminal trial. (HT 43). He had been contacted by Mr. McDonald to represent Movant after she was indicted. (HT 54). He met with the Fairs at the offices of Garland, Samuel & Loeb, (Id.). Mr. Samuel was introduced during this meeting, but Tyrone was not sure that Samuel remained for the entire meeting. (Id.). Samuel later only appeared for one pretrial hearing. (Id.). Neither Samuel or Garland appeared during the trial, but Tyrone testified that he would call and asked them for guidance. (Id.). Other than being introduced at the first meeting, Samuel did not engage the Fairs in strategic discussions or give them advice. (HT 70).

Tyrone met with the Fairs and Mr. McDonald on other occasions, during which Mr. Fair and Mr. McDonald

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[19] McDonald estimated that there were approximately 8 pretrial meetings with Mr. Fair during which Tyrone and Movant were present, but he stated that they probably did not discuss Mr. Fair testifying during those meetings, although it is possible they did. (HT 43-44, 46).

generally dominated the conversations. (HT 59-60). Tyrone recalled speaking with Movant only once prior to trial outside of Mr. Fair's presence, and during the trial, he spoke to her two or three times outside of Mr. Fair's presence. (HT 61).

Tyrone did not remember having any discussions with Movant about whether or not she would testify, with the exception of one meeting early in his representation during which she indicated that she was reluctant to testify, she was not interested in testifying, and that she was anxious or afraid about getting on the stand. (HT 62-66). Tyrone did not recall specifically what Movant said, but it was something to the effect that she was afraid or anxious or uneasy about testifying, and it was his impression that she did not want to testify. (HT 65-66). He did not recall telling Movant that she could not testify. (HT 62).

Tyrone testified that he was familiar with a defendant's Sixth Amendment right to testify on his or her own behalf, that it is the client's decision whether to testify and that this decision cannot be made by the attorney on behalf of his client. (HT 68). He believed that he would have had discussions about Movant's right to testify as it was "not something that was. . .unknown to [him]." *HT 65). He did not believe that Movant told him she wanted to testify, and he testified that if Movant had told him that she wanted to testify, he would have followed up later, and he would have taken further steps such as discussing the advisability of her testifying and preparing her for testifying. (HT 67, 123-25). He said that during the time he represented Movant, he "considered it [his] job" to explain to a client what rights they had and at some point would discuss whether a client would testify. (HT 70). He said he "was very clear that it was their decision whether they would testify or not." (Id.). When asked whether it was his ordinary course of business to

discuss with each client the client's right to testify (if the case appeared to be going to trial), Tyrone testified:

> Well, it certainly is today. I believe it would have been at the time. I had not had a number of clients go to trial; but, yes. . .it was something important that I would have discussed and knew then was important to discuss.

(HT 71).[20] Tyrone did not recall having a specific conversation with Movant in which he told her that she had a right to testify, although he thought "at some point we would have discussed it." (HT 71-72, 76-77). He testified that he did not know that they did not have such a conversation, but he also could not recall that he did advise Movant of her right to testify. (HT 72).

Tyrone and Movant were present during meetings with Mr. Fair and his attorney when the topic of Mr. Fair testifying was discussed, but Tyrone could not recall specifically what was said and does not remember if Mr. Fair's attorney advised him of his right to testify or told him that it was his decision to make. (HT 73-75).

d. Movant

Movant testified on direct examination that she was twenty years old when she met Paul Fair and he gave her a job driving vehicles. (HT 88-89). Mr. Fair was a used-car salesman, and he needed drivers to drive cars back from Maryland. (HT 89). He introduced her to methamphetamine to assist her in driving. (Id.). She admitted that she abused methamphetamine the entire time she was with Paul Fair. (Id.). Movant became romantically involved with Fair within six months of meeting him, and they eventually married.

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[20] Tyrone said this case made him "change [his] practice," and that he now requires his clients to sign a written waiver of their right to testify. (HT 76).

(Id.). After they married, Fair built a house, in his name, which was the house that the Government searched and seized. (HT 90). Mr. Fair owned the property the house was on, and the furniture. (Id.). Movant testified that her husband was "very controlling." (Id.).

Movant testified that her husband paid for her lawyer and took her to get a lawyer. (HT 91). She had only one meeting prior to trial in which Fair and his lawyer were not present, and after the trial began, she had no more than 3 individual meetings with Mr. Tyrone. (HT 93). She said when she met with Mr. Stockton and Mr. Tyrone, she was told she could not testify. (Id.). She said that she was not "told that it was important, that I needed to testify, that it could help me, that that was my right." (HT 94).

When asked what she would have told the jury if she had testified, Movant said that she would have testified that she was not there when the search occurred because she was out shopping with her daughter, and she had not been there for two weeks because she had been on vacation. (HT 92). She would have testified that her husband left the vacation to come back early to the house. (Id.).

On cross-examination, Movant testified that she and Mr. Fair lived in the same house for 8 years, including the period relevant to the indictment, September 1, 1996 through August 14, 1998. (HT 95). She left her first husband because he used cocaine and behaved violently, but she admitted that within one month of leaving her first husband because he used drugs, she began using methamphetamine with Paul Fair. (HT 95-96, 98). She said that Fair hit her a couple of times and she left him, but she returned because she was "stupid." (HT 112). Although she had previously testified that Fair was controlling, when asked whether Fair ever made her do anything she did not want to do, Movant replied "No." (Id.).

Movant claimed that she did not know that Mr. Fair was selling methamphetamine until the trial. (HT 98-99). She admitted that she saw Fair give methamphetamine to friends and that he gave it to her, but she could not recall the friends' names despite the fact that the same friends had been coming to the house to use methamphetamine with Movant and Mr. Fair once or twice a week for 8 years. (HT 99, 101-03, 106). She said that Fair and his friends used drugs in the kitchen, the basement, the living room and possibly their bedroom. (HT 113). Movant admitted that she continued to use methamphetamine after she was indicted while she was on bond, in violation of her bond conditions, and that she failed two drug tests while she was out on bond. (HT 102-03).

Movant admitted that David Dowdle came to the house a couple of times, but she said that she had problems with Dowdle and stayed away from him because he wanted her to get titles for him which she believed were illegal and because he had "come on to" her a couple of times. (HT 107). She claimed that she did not know what Dowdle did with Mr. Fair or whether Dowdle used methamphetamine with Mr. Fair; she denied bringing methamphetamine to Dowdle and Fair; and she denied that Dowdle saw her using drugs, although she admitted that he was in her house when she was using methamphetamine "maybe at one point in time." (HT 107-09). She denied knowing how to re-rock methamphetamine, but she stated that she was "sure" that Fair knew how to do it. (HT 109). She then said she did not know whether Fair knew how to re-rock. (Id.). She remembered Dowdle and her husband fighting and admitted that it was possible that her husband pulled a knife and that it was possible she was present during that incident. (HT 112-13).

Movant testified that she shared a bedroom with her husband, and when asked whether he kept methamphetamine in the house, she answered, "We used it, so yes, I guess he

did." (HT 110). She then said that what they used they kept in the master bathroom in a baggy, which was larger than a marble but smaller than a golfball. (HT 110-11). She admitted that Mr. Fair "was always handing [her] money" when friends came over to use methamphetamine, but she stated that she was not aware that the friends were giving Fair money for drugs. (HT 111). She "guessed" that Fair was paying for everyone's drugs for 8 years, and she never asked him about it. (Id.). She denied knowing where or from whom Fair got his methamphetamine or how he paid for it. (HT 115). She admitted that there were occasions when someone she did not know came to the house and Fair asked her to get money for him. (Id.). She said that Fair was just showing off his money. (Id.). He either handed it to her to put away or told her to get it and bring it to him because he "was forever buying cars and selling cars in the house." (Id.). She claimed that, to her knowledge, anytime Mr. Fair was "showboating" with the money, he was buying a car. (Ht 115-16). She said he stored the money in his pocket or in a nightstand. (HT 116-17).

When asked whether she was familiar with someone named "Ronald Chandara (ph.)," she said she was not, that she did not remember the name. (HT 113). She also denied knowing someone named Byron Portillo. (HT 114).

When asked what she would have said at the trial that was not presented by other witnesses, Movant said she would have testified that she was not at the house on the day of the search and had not been there; that she was a drug user, but that she had no part in selling drugs and did not know about it. (HT 117-18). When asked if she ever told Mr. Tyrone that she wanted to testify, Movant first said that she did not tell Tyrone she wanted to testify because she was nervous. (HT 118). When asked again if she told Tyrone that she wanted to testify, she responded that she "was told not to by him. Why would I tell him that I wanted to? I trusted him. He was my

attorney," and "I never told him I wanted to." (HT 119). She also denied knowing that she could testify if she wanted to testify. (Id.). She said that she would have testified, although she was scared, and that she told Tyrone that she would have testified, but because he told her she could not testify, she trusted him. (HT 120).

4. Analysis

a. Has Movant Met the First Prong under Strickland?

"[A] criminal defendant has a fundamental constitutional right to testify in his or her own behalf at trial. This right is personal to the defendant and cannot be waived either by the trial court or by defense counsel." United States v. Teague, 952 F.2d 1525, 1532 (11th Cir.)(en banc)(emphasis in original), cert. denied, 506 U.S. 842 (1992). Under Teague, defense counsel must "advis[e] the defendant of his right to testify or not testify, the strategic implications of each choice, and that it is ultimately for the defendant himself to decide" whether to testify. Teague, 953 F.2d at 1533. In the absence of such advice, the defendant cannot effectively waive his right to testify. Id.; McGriff v. Dep't of Corr., 338 F.3d 1231, 1237 (11th Cir. 2003), cert. denied, 540 U.S. 1118 (2004). "The burden of persuasion is on a [§ 2255] petitioner to prove, by a preponderance of competent evidence, that counsel's performance was unreasonable." Chandler v. United States, 218 F.3d 1305, 1313 (11th Cir. 2000), cert. denied, 531 U.S. 1204 (2001).

Applying these standards, the undersigned finds that Movant has shown that she was not advised that she had the right to testify. She testified that she was not so advised and that she did not know that she had a right to testify. (HT 94,119). This testimony is uncontradicted by credible evidence to the contrary. Specifically, there is no direct

evidence that Movant was advised that she had the right to testify (or not to testify), or that the ultimate decision whether to testify was her own. Mr. Tyrone could not testify that he ever advised Movant of her right to testify, and although he testified that he believed that it "would have been" his "ordinary course of business" to advise clients of this right at the time of Movant's trial, he could not testify that he did so in this case. (HT 71-72). The fact that this was his first federal criminal trial causes the undersigned to question the usefulness of Tyrone's testimony about his "ordinary course of business" during the relevant period. Tyrone's only specific recollection of a conversation with Movant about her testifying was a conversation early in his representation during which he received the impression that Movant was anxious or scared about testifying (HT 62-66), and he did not recall having a specific conversation with Movant in which he told her she had a right to testify. (HT 71-72, 76-77). Furthermore, the undersigned notes that Tyrone testified that advising his clients of their right to testify is "certainly [his ordinary course of business] today" (HT 71) (emphasis added) and that he now requires clients to sign waivers as a result of the instant case. (HT 76). These facts indicate that Mr. Tyrone's practice of informing clients of their right to testify might not have been as consistent in the early days of his practice as it is today, which is not surprising given the enormous challenges facing even experienced attorneys in representing criminal defendants.[21]

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[21] Mr. Stockton and Mr. McDonald, the two other attorneys who were also present during many of the meetings between Movant, her husband and counsel, also did not testify that Mr. Tyrone advised Movant of her right to testify in their presence.

Therefore, on this record, the undersigned finds no substantial evidence to contradict Movant's testimony and the preponderance of the evidence shows that Movant's counsel did not advise her of her right to testify. The failure to advise her that she had the right to testify or not testify and that the decision whether to testify was ultimately hers constitutes deficient performance under Teague. See Teague, 953 F.2d at 1534 ("Alternatively, if defense counsel never informed the defendant of the right to testify, and that the ultimate decision belongs to the defendant,. . .the defendant clearly has not received reasonably effective assistance of counsel.");[22] Gallego v. United States, 174 F.3d 1196, 1197 (11th Cir. 1999)("[w]here defense counsel never informed the defendant of his right to testify and that the final decision belongs to the defendant alone, defense counsel 'has not acted "within the range of competence demanded of attorney's in criminal cases." and the defendant clearly has not received reasonably effective assistance of counsel.'" (Citations omitted)). Accordingly, Movant has met the first prong of Strickland, because the evidence demonstrates that counsel's performance was deficient. This court, therefore, must determine whether Movant also has demonstrated prejudice so as to meet the second prong under strickland.

b. Has Movant Demonstrated Prejudice?

As noted above, in order to demonstrate prejudice, Movant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S.

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[22] The undersigned notes that in Teague, the court did not find counsel's performance to be deficient because the record showed that Teague's lawyer had advised him that he had a right to testify and that he should not testify, and Teague did not protest his not being called to testify. Teague, 953 F.2d at 1535.

at 694. Movant testified at the evidentiary hearing that if she had testified at the trial, she would have testified that she was not present at the house on the date of the search, August 14, 1998; that she had not been at the house for two weeks because she was on vacation; and that her husband came back to the house before she did. (HT 92, 118). The undersigned finds that this evidence was presented at trial. (See TT 1845-1846, 1852-1853, 1869, 1911-14). Movant's testimony on this point thus would have been merely cumulative, and there is no reason to believe that it would have altered the outcome of the trial.

Movant also testified that if she had testified at trial, she would have testified that although she used methamphetamine, she did not know that her husband was selling it and she was not involved in selling it. (HT 118). The undersigned finds that Movant has not shown that this testimony demonstrates a "reasonable probability" that the outcome of the trial would have been different if she had testified to these facts. In the first place, Movant has not demonstrated a "reasonable probability" that the jury would have found her denials to be credible, particularly in light of her testimony at the evidentiary hearing that she knew methamphetamine was kept in the house; her husband gave methamphetamine to "friends," whose names she could not recall even though the same "friends" had come to the house every week for 8 years; and her husband would give her cash or ask her to give him cash when these "friends" came over. Moreover, the undersigned cannot find a "reasonable probability" that the jury would find such denials credible in light of the overwhelming physical evidence found in the house Movant shared with her husband, including the presence of methamphetamine and paraphernalia relating to the selling of methamphetamine (as opposed to simply using it), including Inositol, a cutting agent; digital scales and zip-lock bags; and cash and weapons found in several places

throughout the house, including the kitchen, the master bedroom, the master bathroom and the basement.

Movant also testified during the evidentiary hearing that she did not know Ronald Schandera or Byron Portillo and that she avoided David Dowdle. (HT 107, 113-14). Her contention is that this testimony would have undermined the credibility of those witnesses with respect to their observations of Movant's involvement in or awareness of her husband's drug activities. However, Movant's testimony at the evidentiary hearing also corroborated some of what the witnesses said, including that she used methamphetamine and handled money. Again, the undersigned does not find that Movant has shown that her denials demonstrate a "reasonable probability" that the jury would have found her testimony credible or that the outcome would have been different.

Movant also contends that she "would have testified to how she was dominated by Paul Fair, a fact to which no other witness testified." (Bench Brief, Doc. 233, p. 12). While Movant testified that Mr. Fair was "very controlling" (HT 90), she also denied that he had ever made her do anything she did not want to do. (HT 112). Movant has not demonstrated how her testimony that her husband was "controlling" would have negated any element of the offenses charged or altered the outcome of the trial.

Finally, Movant testified that she would have testified at trial that she did not own the house that she was living in or the property the house was on or the furniture in the house. (HT 90-92). Again, this testimony would not have negated any element of the offenses charged. In fact, if ownership were a required element, the Government would not have met its burden of proving that element because no evidence was produced at trial with respect to whether or not Movant owned the house which was searched on August 14, 1998.

Movant cites the case of United States v. Clavis, 956 F.2d 1079 (11th Cir. 1992) in her reply brief in support of her contention that her lack of ownership of the residence is relevant. (Reply, Doc. 237, p. 6). In that case, the court stated that evidence that a defendant regularly used a site for distribution of cocaine is not by itself "sufficient proof of knowingly maintaining the premises for that purpose." Clavis, 956 F.2d at 1091. Rather, the court observed, "[a]cts evidencing such matters as control, duration, acquisition of the site, renting or furnishing the site, repairing the site, supervising, protecting, supplying food to those at the site, and continuity are, of course, evidence of knowingly maintaining the place considered alone or in combination with evidence of distributing from that place." Id.

In Clavis, the court rejected the Government's reliance on the case of U.S. v. Onick, 889 F.2d 1425 (5th Cir. 1989) for the proposition that evidence that a defendant had lived at the place at issue was sufficient to show that the defendant knowingly maintained the place for the purpose of manufacturing, distributing, or using any controlled substance. Id. at 1093. In Onick the court had stated, "The jury could infer that [the defendant] *maintained* the house because he lived there." Onick, 889 F.2d at 1431 (emphasis in original). The court in Clavis pointed out that the court in Onick had also stated "[w]e do not mean to suggest that living on the premises is either necessary or sufficient for conviction under this statute." Clavis, 956 F.2d at 1093 (quoting Onick, 889 F.2d at 1431 n.2). The court in Clavis explained:

> Read in light of the facts, the decision in Onick appears to be that living on the premises *in the manner that [defendant] Tolliver did* - papers, clothing, prescription bottles, selection of clothing from the closet, knowledge of drugs and paraphernalia hidden throughout the house which

> the jury could infer that he came across, plus his presence when these items were found[23]-permitted a conclusion that he 'lived in the house and exercised dominion and control over the premises and the drugs.'

Id.

The evidence in Clavis was that several of the defendants rented different houses in which to conduct drug operations. In one of the units, there was some evidence that one of the defendants, Edwards, had lived there, including a receipt, an address book bearing Edwards' name and an application for a Social Security number with Edwards' name on it. 956 F.2d at 1089. A heat sealer and sandwich bags were also found. Id. The court found that these facts were "far removed" from those in Onick and concluded that "[w]hether [Edwards] had dominion and control over the heat sealer and sandwich bags is speculative" and that though the evidence was sufficient to support a conclusion that Edwards had been living at the site, it was insufficient to convict Edwards under the "knowingly maintaining a place" statute, 21 U.S.C.§ 856(a)(1). Id. at 1093.

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[23] The undersigned does not find the Movant's presence or absence at the time the drugs and other items were found to be determinative of the issue whether the Movant knowingly maintained the premises for the purpose of manufacturing, distributing or using a controlled substance. Even if that were the case, however, the issue before the court is not the sufficiency of the evidence to support a verdict, but rather, whether there is a reasonable probability that Movant's testimony would have changed the outcome of the trial. Given that there was uncontroverted evidence at trial that Movant was not present when the house was searched, the jury apparently did not consider that fact to be determinative and there is no reason to believe that Movant's testimony to that fact would have changed the jury's findings.

The undersigned finds that the facts of this case are more similar to those in Onick than to the facts in Clavis, however. In Onick, the officers found illegal drugs and drug paraphernalia throughout the house; they found numerous guns and $80,000 in cash hidden in clothing and a safe; there were numerous receipts made out to defendant; they found papers, clothing and prescription bottles in defendant's name in the house. Similarly, in this case, illegal drugs and paraphernalia, guns and large amounts of cash were found throughout the house, and a pill bottle with Movant's name on it was found. Furthermore, Movant testified during the evidentiary hearing that she and her Co-Defendant, Paul Fair, were married; they lived together in the house for eight years; and they shared the master bedroom. Presumably, these facts would have come out had Movant testified.

The undersigned finds Movant's proposed testimony that she did not own the house or the furniture to be irrelevant to the jury's determination that she and her husband, "aided and abetted by each other, did knowingly and intentionally maintain a place for the purpose of unlawfully using and distributing methamphetamine, a Schedule II controlled substance, in violation of Title 21, United States Code, Section 856(a)(1) and Title 18, United States Code, Section 2." (TT 293).

Movant's argument that "hearing a defendant's side of the story from her own lips alone might have induced the jury to view her more favorably and find her not guilty" (Bench Brief, Doc. 233, p. 11) is no more than speculation. But speculation does not satisfy the prejudice standard: i.e. is there a reasonable probability that had Movant been advised of her right to testify and testified, the result of the trial would have been different?

Furthermore, the Government's cross-examination of Movant at the evidentiary hearing revealed certain credibility

problems that cause the court to doubt further whether there is a reasonable probability that Movant's testimony would have changed the outcome. In addition to what has already been discussed, Movant admitted that in spite of the fact that she claimed she left her first husband because he was using drugs, she began using drugs with Mr. Fair within a month of meeting him. (HT 95-96, 98). Although she acknowledged that the same "friends" came over once or twice a week for 8 years, she claimed she could not recall the friends' names. (HT 99, 101-03, 106). She also admitted that she continued using drugs while she was on bond, a violation of her bond conditions, and that she failed two drug tests while she was on bond. (HT 102-103). These factors lead the undersigned to find it doubtful that a jury would find her testimony believeable.

The undersigned finds that Movant has not shown that "there is a reasonable probability that, but for the counsel's unprofessional errors, the result of the proceeding would have been different," Strickland, 466 U.S. at 694. She has not presented evidence or argument "sufficient to undermine confidence in the outcome" of her trial. Therefore, Movant did not receive constitutionally ineffective assistance of counsel even if counsel failed to advise her of her right to testify. Accordingly, the undersigned **RECOMMENDS** that Ground 1 of Movant's § 2255 motion [Doc. 22] be **DENIED**.

B. Motions to Amend

1. AEDPA's Statute of Limitations for § 2255 Motions

In 1996, Congress passed the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") which provided for, *inter alia*, a one-year statute of limitations for post-conviction §2255 motions. Davenport v. United States, 217 F.3d 1341,

1342 (11th Cir. 2000), cert. denied 532 U.S. 907 (2001). The one-year period runs from the latest of the following: "1) the date on which the judgment of conviction becomes final; 2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action; 3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or 4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence." 28 U.S.C. § 2255; see also Akins v. United States, 204 F.3d 1086, 1089 (11th Cir.), cert denied, 531 U.S. 971 (2000).

2. Movant's Motions to Amend

Movant's conviction became final when the Supreme Court denied certiorari in her direct appeal on October 1, 2001 [Doc. 200, p. 3]. See Farris v. United States, 333 F.3d 1211, 1214-15 (11th Cir. 2003). Therefore, Movant had one year from that date to file her § 2255 motion. She filed her original motion [Doc. 200] on February 22, 2002, and it was thus within the limitations period. She filed her motions to amend her § 2255 motion in July 2004, well beyond the one-year limitations period. She argues, however, that pursuant to Rule 15(a) of the Federal Rules of Civil Procedure, leave to amend her motion should be granted to add claims under Blakely v. Washington, supra. As noted, Movant claims specifically that her sentence was improperly calculated based upon drug quantities, and that it was improperly enhanced based on the presence of firearms and obstruction of justice — all of which were neither charged in the

indictment nor presented to the jury and proven beyond a reasonable doubt. [Docs. 225, 229].[24]

Based upon the one-year limitation period in 28 U.S.C. § 2255, Movant's new claims would be barred as untimely unless they relate back under Fed. R. Civ. P. 15(c) to the original motion to vacate. See Davenport, 217 F.3d at 1344 ("Thus, Davenport's claims in his original § 2255 motion were timely filed, but the new claims in his amended § 2255 motion were not filed until November 6, 1997, and were untimely. Therefore, Davenport's new claims are barred unless they 'relate back' under Rule 15(c) of the Federal Rules of Civil Procedure."). In order to relate back, the claims asserted in the amended motion must have "[arisen] out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading. . . ." Fed. R. Civ. P. 15(c)(2). In other words, "the untimely claim must have arisen from the 'same set of facts' as the timely filed claim, not from separate conduct or a separate occurrence in both 'time and type.'" Davenport, 217 F.3d at 1344.

In his original motion to vacate, the movant in Davenport raised three ineffective assistance of counsel claims. 217 F.3d at 1346. In his motion to amend, the movant attempted to add three new ineffective assistance of counsel claims. Id. The Eleventh Circuit found that although the movant had raised ineffective assistance of counsel claims in the original § 2255

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[24] Counsel for the Government appears to characterize Movant's new claims as claims for ineffective assistance of counsel, in that counsel failed to argue that the trial judge's use of drug quantity to calculate Movant's sentence and his use of the obstruction and firearms enhancements to increase her sentence violated Movant's Sixth Amendment rights. Movant's amended motions, however, do not appear to raise additional claims of ineffective assistance of counsel. Rather, Movant argues that the district court erred in using drug quantity and the obstruction and firearms enhancements when he sentenced Movant.

motion, the amended claims of ineffective assistance of counsel "arose from separate conduct and occurrences in both time and type." Id. The Eleventh Circuit concluded, therefore, that the new claims did not relate back to the date of the movant's timely filed § 2255 motion and that the district court had correctly determined that the new claims were time-barred under the AEDPA. Id.

Here, Movant originally raised three ineffective assistance of counsel claims related to the trial of her case, whereas the amended claims raise specific challenge to her sentence. Just as in Davenport, none of the amended claims here arose from the "same set of facts" as the original claims. Therefore, they do not relate back under Rule 15(c). Accordingly, Movant's claims based on Blakely are time-barred by the AEDPA. See Davenport, 217 F.3d at 1346; see also Pruitt v. United States, 274 F.3d 1315, 1319 (11th Cir. 2001) (barring untimely-added claims of abuse of discretion by the trial judge, prosecutorial misconduct and ineffective assistance of counsel because they did not relate back to original claim asserting an ex post facto violation with respect to sentencing).

Movant argues, however, that regardless of the fact that Movant's amended claims do not relate back under Rule 15(c), Rule 15(a) requires that the court freely give leave to amend when necessary to impart justice. (Bench Brief, Doc. 233, p. 17) Rule 15(a) provides that after a responsive pleading has been served, "a party may amend the party's pleading only by leave of court or by written consent of the adverse party, and leave shall be freely given when justice so requires." Movant argues that allowing her to amend her motion is necessary to impart justice in order to correct her "unjust sentence of incarceration so that it conforms to the proper legal basis for determining that sentence." (Id.). Furthermore, Movant points out the the Blakely decision had

been decided only a few weeks prior to her seeking to amend her motion. (Id.).

The undersigned notes that the Supreme Court has recently found "no distinction of constitutional significance between the Federal Sentencing Guidelines and the Washington procedures at issue" in Blakely. United States v. Booker, No. 04-104 and 04-105, 2005 U.S. LEXIS 628, at *29 (Jan. 12, 2005). The Court concluded that its holding in Blakely applies to the United States Sentencing Guidelines and reaffirmed its holding in Apprendi v. New Jersey, 530 U.S. 466 (2000)[25]: "Any fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt." Id. at *48-50. The Court went on to sever the provision of the federal sentencing statute that made the Sentencing Guidelines mandatory, thereby making the Sentencing Guidelines advisory. Id. at *52.

The undersigned finds that Movant has not shown that justice requires that she be granted leave to amend. In the first place, Movant has not shown that the holding of Blakely or now Booker apply to cases on collateral review. Case law suggests otherwise. The Court in Booker expressly stated that the holding applied "to all cases on direct review," but was silent with respect to cases on collateral review. Booker, *92-93 (emphasis added). Other courts have concluded that Apprendi and its progeny, including Blakely and Ring v.

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[25] In Apprendi, the Supreme Court held that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Apprendi, 530 U.S. at 490.

Arizona, 536 U.S. 584 (2002),[26] do not apply to cases on collateral review. In a case decided on the same day as Blakely, Schriro v. Summerlin, __ U.S. __, 124 S.Ct. 2519, 159 L.Ed.2d 442 (2004), the Supreme Court held that Ring is not retroactive to cases on collateral review. Summerlin, 124 S.Ct. at 2526-27. The Court stated:

> The right to jury trial is fundamental to our system of criminal procedure, and States are bound to enforce the Sixth Amendment's guarantees as we interpret them. But it does not follow that, when a criminal defendant has had a full trial and one round of appeals in which the State faithfully applied the Constitution as we understood it at the time, he may nevertheless continue to litigate his claims indefinitely in hopes that we will one day have a change of heart.

Id. at 2526. The Court concluded, "Ring announced a new procedural rule that does not apply retroactively to cases already final on direct review." Id. at 2526-27.

In McCoy v. United States, 266 F.3d 1245, 1246, 1258 (11th Cir. 2001), cert. denied, 536 U.S. 906 (2002), the Eleventh Circuit held that the "new rule of criminal procedure announced in Apprendi," which is the forerunner to Blakely and Booker, does not apply retroactively to cases on collateral review.[27] Relying on Teague v. Lane, 489 U.S. 288 (1989), the circuit court affirmed the dismissal of the petitioner's § 2255 motion by the district court because the petitioner, "whose

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[26] Ring extended application of Apprendi to facts increasing a defendant's sentence from life imprisonment to death.

[27] The § 2255 motion at issue in McCoy was the petitioner's initial and only motion to vacate. McCoy, 266 F.3d at 1247.

conviction became final before the Supreme Court announced Apprendi, cannot now collaterally challenge his conviction on the basis of a claimed Apprendi error." Id. at 1285.[28] See also Coleman v. United States, 329 F.3d 77, 90(2d Cir.) (Apprendi does not apply retroactively to initial §2255 motions), cert. denied, 540 U.S. 1061 (2003); United States v. Brown, 305 F.3d 304, 310 (5th Cir. 2002)("[W]e conclude that Teague continues to apply to petitions made under 28 U.S.C. § 2255 . . ., and that Apprendi creates a new rule of criminal procedure which is not retroactively applicable to initial petitions under § 2255."), cert. denied, 538 U.S. 1007 (2003); United States v. Mora, 293 F.3d 1213, 1219 (10th Cir.)("We therefore agree with our sister circuits that have considered the issue that Apprendi is not a watershed decision and hence is not retroactively applicable to initial habeas petitions."), cert. denied, 537 U.S. 961 (2002).

Several courts have also held that the holding in Blakely does not apply to cases on collateral review. See, e.g., United States v. Beatty, No. 04-6648, 2004 U.S. App. LEXIS 16161,*2 (4th Cir. Aug. 5, 2004) (court denied petitioner's motion for enlargement of time to amend his § 2255 motion to raise a claim under Blakely "because Blakely does not apply in the § 2255 context."); see also United States v. Quintero-Araujo, 343 F.Supp.2d 935, 945 (D. Id. 2004); Carbajal v. United States, 99 Civ. 1916 (MGC), 2004 U.S. Dist. LEXIS 20350, at *23-24 (Oct. 8, 2004); United States v. Lowe, No. 04 C 50019, 2004 U.S. Dist. LEXIS 15455 *7-8

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[28] The court in McCoy also found that the petitioner was procedurally barred from asserting an Apprendi claim in his §2255 motion because he had failed to assert such a claim on direct appeal, notwithstanding the fact that Apprendi had not been decided when his case was on direct review. 266 F.3d at 1258. Similarly, in this case, Movant did not include a Blakely or Booker-type claim with respect to her sentencing in her direct appeal, and her new claims would thus appear to be procedurally barred.

(N.D. Ill. Aug. 6, 2004); United States v. Malone, No. 04 C 50327, 2004 U.S. Dist. LEXIS 14910, *2 (N.D. Ill. Aug. 3, 2004); United States v. Stoltz, 325 F.Supp.2d 982, 986-987 (D. Minn. 2004)(court allowed the petitioner to amend his §2255 motion to add claim under Blakely, but then denied that claim because "*Blakely* does not apply retroactively to matters on collateral review.")

In a recent case decided by the Eleventh Circuit, In Re: Anderson, No. 05-10045-F, 2005 U.S. App. LEXIS 1097 (Jan. 21, 2005), the Eleventh Circuit considered the petitioner's application seeking an order authorizing the district court to consider a second or successive motion to vacate, set aside, or correct his federal sentence pursuant to § 2255. The petitioner sought to file a second or successive § 2255 motion in order to assert, *inter alia*, claims pursuant to Blakely and Booker. Id. at *3. The court discussed cases that have held that Apprendi and its progeny, including Blakely and Ring, are not retroactively applicable to cases on collateral review. Id. at *6-10. The court denied the petitioner's request, concluding, "It follows that because Booker, like Blakely and Ring, is based on an extension of Apprendi, [the petitioner] cannot show that the Supreme Court has made that decision retroactive to cases already final on direct review." Id. at *11. See also In re Dean, 375 F.3d 1287, 1290 (2004) (denying application authorizing district court to consider a second or successive § 2255 petition based on Blakely because Supreme Court has not expressly made Blakely retroactive to cases on collateral review).

It is clear that if Movant were seeking to file a successive petition to assert the new claims asserted here, she would be precluded from doing so by the Eleventh Circuit's recent decision in Anderson. In light of this fact, and because these new claims do not meet the relation back requirements of Fed. R. Civ. P. 15(c), the undersigned concludes that the language

of Fed. R. Civ. P. 15(a) providing that leave to amend "shall be freely given when justice so requires" does not support amendment of Movant's petition to include these new claims. "Justice" does not require the court to consider claims that are barred by the rules governing Section 2255 motions and the Federal Rules of Civil Procedure. Alternatively, even if the undersigned were to recommend that Movant be permitted to amend her Section 2255 motion to assert these new claims, the undersigned would also recommend that these claims be denied because Blakely is not retroactively applied to matters on collateral review. See Stoltz, 325 F.Supp.2d at 986-87.

Accordingly, because Movant's claims pursuant to Blakely (and, by extension, Booker) set forth in her motions to amend are untimely and do not relate back to her initial § 2255 motion, and for the other reasons discussed above, it is **RECOMMENDED** that Movant's "Motion for Leave of Court and Amendment to Motion to Vacate, Set Aside, or Correct Sentence" [Doc. 229] and "Motion for Leave of Court and Second Amendment to Motion to Vacate, Set Aside, or Correct Sentence" [Doc. 225] be **DENIED**.[29]

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[29] The court also notes that pursuant to Booker, the most Movant would be entitled to is a re-sentencing, in which the district court would be required to consider, though not necessarily follow, the Sentencing Guidelines. Therefore, it is not necessarily the case that Movant's sentence would be reduced. See United States v. Rodriguez, No. 04-12676, 2005 U.S. App. LEXIS 1832, *26-28 (11th Cir. Feb. 4, 2005). Furthermore, the fact that there is a possibility that Movant could receive a lighter sentence if she were allowed to pursue a § 2255 motion based on Blakely or Booker is irrelevant to the determination of whether such a claim is available to her. See, e.g., Summerlin, 124 S.Ct. 2519. In that case, the fact that a person was sentenced to death under a system held to be violative of the Sixth Amendment in Ring apparently did not convince the Supreme Court that the holding in Ring afforded the defendant an opportunity to be re-sentenced and possibly avoid the death sentence.

III. Conclusion

For the foregoing reasons, the undersigned hereby **RECOMMENDS** that Ground 1 of Movant's § 2255 motion [Doc. 200] be **DENIED**.[10]

IT IS FURTHER RECOMMENDED that Movant's motions to amend her § 2255 motion [Docs. 225, 229] be **DENIED**.

The Clerk is **DIRECTED** to terminate the district court's referral of the case to the undersigned magistrate judge.

IT IS SO RECOMMENDED, this 11th day of February, 2005.

/s/ Susan S. Cole

SUSAN S. COLE

United States Magistrate Judge

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[10] The undersigned previously recommended that Grounds 2 and 3 be denied. [Doc. 222].